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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

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Re: Fair and Accurate Credit Transactions Act of 2003, Medical Information Rulemaking
OCC Docket Number 04–09
Board Docket Number R–1188
FDIC RIN 3064–AC81
OTS Docket Number 2004–16
NCUA: Federal Trade Commission Comments on Proposed Rule Part 717, Fair Credit Reporting–Medical Information

Ladies and Gentlemen:

Your respective agencies (the "Agencies") have initiated the above-referenced rulemaking proceeding to implement the medical privacy provisions of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). The Federal Trade Commission ("FTC" or "Commission") offers the following comment to aid the Agencies in their rulemaking.

FACTA adds to the Fair Credit Reporting Act ("FCRA") new restrictions on the use of medical information in credit transactions, and gives the Agencies, but not the FTC, express authority to make exceptions to these restrictions. Because the proposed rules would provide exceptions to these restrictions only for entities regulated by the Agencies, the Commission is concerned that portraying certain permitted uses of the information as exceptions by rule, rather than as outside the statutory prohibition, may harm consumers and businesses by unnecessarily favoring certain lenders in markets for loans requiring the consideration of medical information. In this comment letter, the Commission recommends several clarifications that would avoid regulation creating unnecessary distortion of such markets.

Interest and Experience of the Federal Trade Commission

The FTC is charged by statute with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce,[1] and is the only federal agency with general jurisdiction to enforce the nation's consumer protection and antitrust laws. Under this statutory mandate, the Commission seeks to identify business practices that diminish consumer choice or distort competition without offering countervailing benefits.

The FTC also is charged with administering and enforcing numerous financial and general privacy laws, including the FCRA, the Gramm-Leach-Bliley Act, the Controlling the Assault of Non-Solicited Pornography and Marketing ("CAN-SPAM") Act, and the Children's Online Privacy Protection Act. In addition, the FTC takes action under the FTC Act to prevent unfair or deceptive acts or practices involving consumer privacy, including action against companies for violating their privacy promises to consumers[2] or for deceiving consumers about the collection or use of their personal information.[3] From its numerous workshops on emerging privacy issues, such as computer "spyware,"[4] to the National Do-Not-Call Registry,[5] the Commission has taken a leadership role on consumer privacy issues.

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[1]Federal Trade Commission Act, 15 U.S.C. § 45.

[2]See, e.g., TowerRecords.com, http://www.ftc.gov/opa/2004/04/towerrecords.htm

[3]See, e.g., 30-Minute Mortgage, http://www.ftc.gov/opa/2003/12/30mm2.htm.

[4]See 69 FR 8538 (Feb. 24, 2004) (announcing workshop).

[5]See 68 FR 4580 (Jan. 29, 2003) (final rule).

FACTA's Medical Privacy Provisions

FACTA section 411 amends the FCRA to add a new section prohibiting creditors from obtaining or using "medical information" in connection with credit eligibility determinations.[6] The statute authorizes the Agencies – but not the FTC – to make rules providing for necessary and appropriate exceptions to this general prohibition, consistent with the purposes of the section.

Section 411 also adds a new section to the FCRA limiting the sharing of medical information among affiliated companies,[7] but provides for several exceptions to this limitation and permits the Agencies – and the FTC – to make rules allowing medical information to be shared among affiliated companies as necessary and appropriate.

Finally, section 411 amends the FCRA to prohibit consumer reporting agencies ("CRAs") from furnishing medical information in connection with a credit transaction. But the law specifically allows CRAs to furnish medical information where the information "is reported using codes that do not identify . . . the specific [medical services] provider or the nature of such [medical] services." FCRA section 604(g)(1)(C). Furthermore, CRAs may furnish medical information where the information is relevant to process or effect the credit transaction and the consumer provides specific written consent for the furnishing of the report. FCRA section 604(g)(1)(B).

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[6]"Medical information" is defined as information or data, whether oral or recorded, in any form or medium, created by or derived from a health care provider or the consumer, that relates to the past, present, or future physical, mental, or behavioral health or condition of an individual, the provision of health care to an individual, or the payment for the provision of health care to an individual. FCRA § 603(i).

[7]Existing FCRA section 603(d)(2) provides for certain exceptions from the definition of consumer report, allowing companies to share consumer information with their affiliates without thereby becoming consumer reporting agencies, with all of the attendant duties and limitations. New FCRA Section 603(d)(3), added by FACTA section 411, removes these exceptions with respect to medical information.

The Proposed Rules

The Agencies' proposed rules would implement section 411 by prescribing certain exceptions from the general prohibition on obtaining or using medical information in connection with credit eligibility determinations.[8] Specifically, the proposed rules would allow medical information to be obtained and used in connection with a determination of credit eligibility:

- when it is needed to identify debt or income, which may be considered to the same extent other debt or income would be considered;
- to determine whether a power of attorney is necessary and appropriate;
- to comply with federal, state, or local law;
- when the information is obtained with consumer consent from a CRA under FCRA section 604(g)(1)(B) – that is, as part of a credit report that, pursuant to the consumer's consent, includes medical information;
- for fraud prevention;
- to verify the purpose of a medical loan and the use of proceeds; and
- with the consumer's specific written consent.

The proposed rules also would define "credit eligibility" and "obtain" to allow medical information to be obtained and used in connection with credit transactions in certain limited circumstances. For example, "credit eligibility" is defined to exclude processing a transaction, maintaining an account, or determining whether a benefit is due under a credit insurance policy or debt cancellation contract. With respect to "obtain," the Agencies would adopt a "rule of construction:" a creditor cannot "obtain" medical information unless he specifically asks for such information.

The Effect of the Proposed Rules on Consumers and Competition

As outlined above, the proposed rules would create specific exceptions to the FCRA's general prohibition on the use or collection of medical information to underwrite credit. The Commission agrees with the Agencies that for many credit transactions it is necessary and appropriate to obtain or use medical information to make a credit eligibility determination. There is a well-established market in "medical loans" – for example, loans to finance a medical procedure (e.g., laser eye surgery) or secured by a medical device (e.g., a kidney dialysis machine). In addition, medical information may be relevant when extending traditional credit – for example, where a consumer is seeking to finance a handicap-equipped automobile.

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[8]The proposed rules also would prescribe certain exceptions from the limitation on sharing medical information among affiliated companies. The FTC has authority to make a rule with respect to the affiliate-sharing provisions, and offers no comment on these portions of the proposed rule.

It appears, however, that only a creditor subject to the jurisdiction of one of the Agencies is entitled to the benefit of exceptions created by the proposed rule.[9] The Commission, based on its considerable consumer protection and antitrust experience, believes that this regulatory structure may unnecessarily distort markets for loans and limit consumers' choice of lender. Non-bank entities committed to the Commission's jurisdiction – such as mortgage companies, auto finance companies, loan brokers, car dealers, third party credit "arrangers," state-chartered credit unions, and doctors who allow their patients to pay over time – may no longer be able to assess the risk of medical loans and other credit requiring the consideration of medical information, making them less able to compete in this market.[10] Moreover, because many creditors subject to the Commission's jurisdiction may originate loans for, or sell or assign credit obligations to, entities regulated by one of the Agencies, the rule may not achieve its objective of permitting the use and consideration of medical information when "necessary and appropriate to protect legitimate operational, transactional, risk, consumer, and other needs." FCRA section 604(g)(5)(A). Consumers who need or would benefit from a creditor's consideration of medical information might be able to obtain credit only from a bank, thrift, or Federal credit union, and even then only when they apply directly to such a lender.

Purpose of this Comment

Although the absence of Commission rulemaking authority in section 411 of FACTA may result in some differentiation between bank and non-bank lenders, the Commission believes that it would be a mistake to read this differentiation more broadly than necessary. In enacting FACTA, Congress did not indicate an intent to favor one category of creditor over another, and the adoption of an exception by rule applicable only to banks, thrifts, and Federal credit unions rather than by an appropriate interpretation of the statute would favor those entities over other types of lenders.

With respect to many legitimate uses of medical information, the statute allows for an interpretation that would permit all lenders to use the medical information in the same manner for a particular purpose. A posture by the Agencies that use of medical information in such instances requires an exception by rule to the statutory prohibition would unnecessarily disadvantage entities not subject to the rule and could effectively limit consumers' choice of lenders. The Commission therefore urges the Agencies to adopt reasonable interpretations of the statute to avoid such harm.

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[9]For example, the National Credit Union Administration's would apply only to Federal credit unions. See proposed 12 CFR 717.1(b)(2). Thus state-chartered credit unions would not be able to consider medical information in making credit decisions while their federally chartered competitors would.

[10]The terms "credit" and "creditor" are defined in the FCRA by reference to the Equal Credit Opportunity Act. See FCRA section 603(r)(5), added by FACTA section 111. Thus credit arrangers, brokers, or doctors are "creditors" for the purposes of the medical information restrictions. See Regulation B, 12 CFR 202.2(l); compare Regulation Z, 12 CFR 226.2(a)(17).

Of course, the Agencies may wish, for clarity's sake, to include their interpretations of the statute in a rule as well. A rule that describes all of the circumstances in which banks, thrifts, and Federal credit unions may obtain and use medical information can help minimize the burdens on these lenders and achieve compliance, by providing covered entities with one comprehensive discussion of permitted conduct.

We recommend that the rule or the accompanying statement of the Agencies make clear the uses that are permitted by statute, adopting the interpretations of the statute set forth below. We urge the Agencies to adopt those interpretations for the reasons explained, in light of the importance of avoiding differences among lenders in the uses of medical information permitted to them where such differences are not mandated by law, and in the interest of consistent interpretation of the statute by the several agencies charged with administering it.

Specific interpretive issues

"Credit Eligibility"

The Agencies have defined "credit eligibility" to exclude employment and insurance decisions; transaction or payment processing; and account maintenance or servicing. The Commission agrees with the Agencies that transaction processing, account maintenance, and employment and insurance decisions do not involve any determination of credit eligibility.

The Agencies, however, have defined "credit eligibility" only as "used in this subpart." See proposed section ___.30(a)(2). The Commission recommends that the Agencies make clear in the Statement of Basis and Purpose for the final rule that they are defining "credit eligibility" as a statutory matter, and not solely for the purposes of the rule.

Payment of Insurance Benefits

The Agencies also have defined "credit eligibility" to exclude "[a]ny determination of whether the provisions of a debt cancellation contract, debt suspension agreement, credit insurance product, or similar forbearance practice or program are triggered." See proposed section ___.30(a)(2)(i)(B). The Agencies, however, request comment on "whether it is more appropriate to grant an exception" with respect to these transactions, rather than address them as a general definitional matter.

Because this is a common sense and self-evident construction of the term "credit eligibility," the Commission recommends that the Agencies continue to address the payment of credit insurance benefits through an interpretation. It therefore is unnecessary to create an exception by rule. Indeed, if the Agencies created an exception, it might result in a negative implication that only entities covered by the rules can consider relevant medical information needed to pay credit insurance or debt cancellation benefits, while others cannot.

Obtaining Medical Information Inadvertently

The Agencies propose a "rule of construction" for receiving unsolicited medical information – that is, a creditor does not "obtain" medical information for the purposes of the proposed rule if it receives medical information without specifically requesting such information. See proposed section ___.30(b). The Agencies seek comment on the appropriateness of this rule of construction and on whether this provision should be drafted as an exception to the general prohibition, rather than as a rule of construction.

The Commission agrees with the Agencies' proposal that unsolicited medical information should be addressed by interpretation, and recommends further that the Agencies clarify that this rule of construction does not simply apply to the Agencies' rules, but applies to construction of the statute more generally. Under the rule of construction as currently drafted, a creditor "does not obtain medical information for purposes of [the rule]," if the creditor does not specifically request the information and does not use the information to determine credit eligibility. See proposed section ____.30(b) (emphasis added). The Commission recommends that the Agencies make clear that the rule of construction applies with equal force to the statute, and that inadvertently obtaining medical information does not violate either the statute or the rule.[11] Specifically, we suggest that the Agencies replace the phrase "for purposes of [the rule]" with "for purposes of [the statute]."

Powers of Attorney and Legal Compliance

The Agencies' proposed rule includes two exceptions to the statutory prohibition that allow medical information to be obtained and used for legal compliance and to determine the necessity of powers of attorney. See proposed sections ____.30(d)(i) and (ii). First, the proposed rule allows medical information to be obtained or used "to comply with applicable requirements of local, state, or federal laws," and cites as an example state laws "requir[ing] creditors to consider medical information in certain circumstances to protect populations that may be vulnerable to financial abuse by caregivers." 69 FR 23380, 23386. These laws typically permit, but do not require, financial institutions to report evidence of financial abuse to the relevant authorities.[12] The Commission believes that this type of account monitoring to comply with legal requirements and to protect the interests of disabled customers does not involve a determination

[11]The Commission agrees with the Agencies that a creditor who inadvertently obtains medical information and then uses that information to make a credit decision violates both the statute and the rules.

[12]See, e.g., Mich. Comp. Laws § 400.11a(3). Only four states appear to require bank employees to report suspected abuse. Fla. Stat. § 415.1034; Ga. Code § 30-5-4; Kan. Stat. § 39-1431; Miss. Code § 43-47-7.

of credit eligibility and is not prohibited by the statute.[13] Therefore, an exception by rule is unnecessary, and the Commission recommends that the Agencies make clear that the conduct described in proposed section ___.30(d)(1)(ii) is permitted under the statute itself.

Second, the proposed rule allows medical information to be obtained and used "to determine whether the use of a power of attorney or legal representative is necessary and appropriate." See proposed section ___.30(d)(1)(i). It is unclear why a broad exception is needed. A power of attorney typically does not contain medical information. Therefore, a creditor would not need to obtain or use medical information to determine its validity. There may be limited circumstances where a power of attorney may indicate a consumer's health or condition – for example, where a court has appointed a guardian for a consumer adjudicated incompetent or where a power of attorney is triggered by a consumer's medical condition. In these instances, merely being notified of the existence of this medical condition is not tantamount to obtaining or using that information to determine credit eligibility. The Agencies should clarify that "obtaining medical information" in these situations is not prohibited by the statute.

Information Obtained from CRAs

As noted above, FACTA section 411 amends the FCRA specifically to permit CRAs to provide, "in connection with a credit transaction," coded medical information in consumer reports. FCRA section 604(g)(1)(C) (hereinafter, "coding provision"). CRAs also can provide full uncoded medical information in a credit report with the consent of the consumer. FCRA section 604(g)(1)(B) (hereinafter, "consumer consent provision"). These provisions appear to conflict with the provision prohibiting creditors from obtaining or using medical information in connection with a credit transaction. FCRA section 604(g)(2). As explained below, the Commission urges the Agencies to read the statute to resolve this conflict.

With respect to coded information received from CRAs under the coding provision, the Agencies have stated that they "do not believe that it is necessary to propose a separate exception" allowing creditors to use coded information, but have nonetheless solicited comment on whether they should provide a specific exception or should take an interpretive approach. See 69 FR 23380, 23386. The Agencies also have asked what interpretation is most appropriate: should coded information be deemed an exclusion from the definition of "medical information" or should "the broad prohibition in [FCRA] section 604(g)(2) on obtaining and using medical information in credit eligibility determinations [] be construed as being qualified by the specific provisions in section 604(g)(1) that authorize consumer reporting agencies to furnish consumer

[13]The relevant state laws address the reporting of instances of suspected financial abuse, and do not address the extension of credit in instances of suspected abuse. Entirely apart from its compliance duties, a bank might determine not to extend credit to a legal representative of a disabled consumer, on the belief that the legal representative is abusing his position of trust to defraud the consumer. This type of fraud prevention, addressed in the Agencies' proposed rules, is beyond the scope of this comment letter. See proposed section ___.30(d)(1)(iv).

reports containing medical information under certain limited circumstances." 69 FR 23380, 23386. The Commission urges adoption of the latter approach. Rules of statutory construction dictate that provisions of a statute be construed to be consistent, if possible, and that specific provisions qualify a general prohibition.[14] Thus, the Agencies should recognize the statutory permission for CRAs to provide coded information to lenders as concomitantly implying statutory permission for lenders to receive and use such information.[15]

With respect to uncoded information received from CRAs with consumer consent under the consumer consent provision, the Agencies provide a specific exception that allows creditors to use this information. See proposed section ____.30(d)(1)(iii). The Agencies do not explain the reason for treating the coding provision and the consumer consent provision differently – that is, why they determined to take an interpretive approach for the former but propose a specific exception for the latter. Congress, for its part, did not distinguish between the two provisions or evidence any intent that only banks should be able to obtain medical information from CRAs under the consumer consent provisions of section 604(g)(1)(B). The FTC believes that the two provisions should be treated the same: all of the specific permissions of FCRA section 604(g)(1) should be read as specific statutory exclusions from the general prohibition of section 604(g)(2). Absent this construction, the two provisions irreconcilably conflict, which cannot have been Congress' intent. The Agencies observe, correctly, that

> (1) it is unlikely that Congress would permit consumer reporting agencies to furnish consumer reports containing medical information in connection with credit transactions without permitting creditors to obtain and use these reports,

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[14]Statutory provisions should be construed so as to be consistent with each other. Citizens to Save Spencer County v. U.S. Environmental Protection Agency, 600 F.2d 844, 870 (D.C. Cir. 1979). In construing statutory provisions that conflict, specific provisions govern general provisions, absent a clear intent to the contrary. See, e.g., Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976), quoting Morton v. Mancari, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment."). That is, the specific provisions qualify or provide exceptions to the general provisions. See, e.g., Townsend v. Little, 109 U.S. 504, 512 (U.S. 1883) ("[G]eneral and specific provisions in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, can subsist together, the specific qualifying and supplying exceptions to the general.")

[15]If non-bank creditors are unable even to obtain coded information about medical debts (e.g., to determine a debt-to-income ratio), they may become unable to underwrite any credit risk competitively with a bank. The bank could consider medical debts, by dint of the Agencies' proposed exceptions, enabling the bank to determine credit risk more precisely. The non-bank creditor, however, would have access to less information, creating a potential adverse selection problem – those borrowers with large medical debts affecting their ability to repay may seek out the lenders who cannot obtain information about or consider those debts.

> and (2) in these circumstances, Congress may well have provided the consumer protections it deemed necessary by specifying the limitations under which consumer reporting agencies could furnish reports containing medical information.

69 FR 23380, 23386. This analysis applies as fully to the consumer consent provisions of FCRA section 604(g)(1)(B) as it does to the coding provisions of FCRA section 604(g)(1)(C).[16]

In addition, the Commission reads FACTA to allow consumers and others to disclose medical information to creditors directly in the same manner and under the same circumstances that a CRA could disclose such information – that is, in coded form or pursuant to consumer consent. The Commission urges the Agencies to adopt a similar interpretation. Strict application of the exceptions in section 604(g)(1) will result in a creditor's being able to obtain medical information, coded or uncoded, from a CRA, but not from anyone else. That is, a creditor can buy the information from a CRA, but cannot get it from the consumer himself under the identical circumstances and for the same purposes. The Commission believes that this anomalous result will unnecessarily disadvantage consumers – it will result in higher costs for credit that are not outweighed by enhanced privacy or other countervailing benefits. The Commission believes that Congress did not intend this result and reads the statute to permit creditors to obtain directly from consumers and to use (1) coded medical information and (2) uncoded medical information relevant to "process or effect" a credit transaction. The statute also permits creditors to obtain from non-CRA third parties and use (1) coded medical information and (2) uncoded medical information relevant to "process or effect" a credit transaction where the consumer has consented to the disclosure.

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[16] In addition, there is no indication that Congress believed it to be necessary that the Agencies make special rules to permit creditors to obtain or use medical information obtained from consumer reports under these circumstances. The legislative history notes certain legitimate uses for medical information in connection with credit transactions, where the Agencies should consider making exceptions to the general prohibition. See H. Rept. 108-263 at 53. Medical information legally obtained from a CRA in a consumer report is not one of the areas that Congress mentioned as needing a special exception. Without such an exception read into the law, however, it would be impossible for a creditor to even obtain a consumer report, for fear it will contain medical information, coded or not. Given that FACTA was motivated primarily by Congress' interest in preserving and extending the "the benefits that our national credit reporting system has visited upon consumers of financial products," Conf Rept 108-396 at 65, Congress could not have intended to discourage the obtaining of consumer reports in this manner.

Incidental Credit

When a provider of goods or services bills a consumer, rather than requiring payment at the time of delivery, this is technically the extension of credit under the FCRA.[17] When the provider is offering medical goods or services, it will of necessity obtain medical information as a result of the transaction. Thus a doctor who bills his patients for services rendered may be subject to the new prohibition on the use of medical information in making credit decisions, and may not be entitled to the benefit of the Agencies' exceptions from that prohibition.[18]

The Commission believes that this type of transaction is permitted under the statute because the doctor is not obtaining or using medical information in connection with a credit eligibility decision. The doctor obtains medical information as a result of the underlying medical transaction, and not for the purposes of determining whether or not to extend credit. The extension of credit is merely incidental to the medical treatment. The credit is not offered for its own sake, but for administrative ease or consumer convenience. Typically, the amount of credit extended in these transactions is minimal, no finance charge is imposed, and the terms require quick repayment.[19] In addition, the only medical information considered by the doctor in extending credit is the fact that the borrower is his patient.

As a result, the Commission reads the statute to permit providers of medical goods and services to extend credit to consumers where the credit is incidental to the rendering of medical treatment. In these situations, the medical providers do not obtain or use medical information in connection with credit eligibility decisions, and the Commission urges the Agencies to interpret the statute in this manner.

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[17]FACTA section 111 adds new definitions for "credit" and "creditor" to the FCRA, providing that those terms are as defined in the Equal Credit Opportunity Act ("ECOA"). The ECOA defines "credit" as, among other things, any right to "purchase products or services and defer payment therefor." 12 CFR 202.2(j).

[18]See supra note 10 and accompanying text.

[19] See, e.g., 12 CFR 202.3(c) (defining "incidental credit" as credit not subject to a finance charge and not payable by agreement in more than four installments).

Arranging Credit

Consumers often wish to finance medical products or services, perhaps because they are uninsured, underinsured, or their health insurance will not pay for the products or services (e.g., elective procedures, laser eye surgery, cosmetic surgery, or orthodonture). In these cases, providers of medical products or services may assist or advise their customers in obtaining financing, and this advice may make the providers "creditors" under the FCRA.[20]

For example, a plastic surgeon may provide his patient with a brochure for a bank that will finance cosmetic surgery. The Commission believes that a doctor who assists a patient in this manner does not violate the statute, because he does not obtain or use medical information in connection with a credit eligibility decision. As is the case with incidental medical credit, the doctor is obtaining information for the purposes of the underlying medical transaction (e.g., the surgery), not for the purpose of extending credit.[21] The Commission encourages the Agencies to read the statute to permit this conduct.

Consideration of Collateral

The Agencies' proposed rules provide a specific exception allowing a lender to obtain and use information about certain property pledged as security for a loan, e.g., a medical device used as collateral. The Commission agrees that consumers should be able to finance medical devices or other real or personal property that may bear a relationship to a person's physical, mental, or behavioral health or condition, e.g., a handicap-equipped automobile or a house outfitted with special equipment for a person with disabilities.

The Commission does not agree, however, that this needs to be done by rule, because information about collateral should not be considered "medical information:" it does not pertain to an individual, but rather is information about inanimate property. When a creditor considers whether to accept as collateral real or personal property with some medical significance, it is not evaluating the borrower's health or ability to repay but is evaluating the value of the collateral: e.g., the property's condition, age, and market value. Moreover, there is no indication that a person borrowing money to purchase a medical device is actually the person using the medical device. The consumer obligated on the loan could be purchasing the device, for example, for a spouse, child, parent, or other relative or close friend. With respect to real property, the nexus between the borrower and the person with the medical condition can become even more attenuated – for example, a consumer financing a home in which a previous owner installed an

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[20] See 12 CFR 202.2(l) (defining "creditor" to include "a person who, in the ordinary course of business, regularly refers applicants or prospective applicants to creditors").

[21] The Commission notes that the lender to whom the doctor refers the consumer's credit application may need the benefit of the Agencies' rules in order to provide the financing for the medical procedure.

elevator for a person with disabilities. This extra equipment may enhance or diminish the value of the home, but how is a creditor to appraise the house if he is unable to consider these attributes? It is evident to the Commission that the term "medical information" does not include information pertaining to collateral, and the Commission urges the Agencies to adopt a similar interpretation.[22]

Conclusion

FACTA section 411 prohibits creditors from obtaining or using medical information in connection with credit eligibility determinations, except as allowed by rules of the Agencies. The Agencies, however, have limited jurisdictions, and many creditors may be unable to take advantage of the exceptions created by the Agencies' rule. To the extent that appropriate circumstances for obtaining or using the information are permitted under the statute itself, defining these circumstances as exceptions to the statute would unnecessarily disadvantage such creditors and limit consumers' choice of lender.

The Commission reads the statute to permit numerous beneficial uses of medical information. Specifically, in the Commission's view, the statute permits a creditor to consider medical information:

- to determine whether to pay credit insurance or debt cancellation benefits;
- to process transactions and maintain accounts, including to determine whether a power of attorney is necessary and to comply with local, state, or federal laws; and
- in the same manner, to the same extent, and under the same circumstances that the creditor could consider information obtained from a CRA under FCRA section 604(g)(1), without regard to whether the information was obtained from a CRA, from the consumer, or from another third party.

Also, under the Commission's interpretation of the statute, a creditor does not violate the law by obtaining medical information inadvertently, so long as the creditor does not then use the information for credit eligibility decisions.

In addition, the Commission does not read the statute to prohibit the extension of credit that is simply incidental to a medical transaction, such as when a doctor invoices his patient for an insurance copayment. Moreover, the Commission interprets the statute to allow providers of medical products or services to arrange credit for their customers. Medical providers that assist their customers in this manner do not obtain or use medical information in connection with a credit eligibility decision.

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[22]Were a creditor to draw an inference about a borrower's ability or willingness to repay based on the medical collateral securing a loan, that would not be permitted under either the law or the Agencies' proposed rules.

Finally, the Commission interprets the term "medical information" to include only personally identifiable information. Information about real or personal property pledged as collateral is not medical information about an individual.

In order to avoid the harms stemming from unnecessary regulatory favoring of certain categories of lenders over others, the Commission urges the Agencies to adopt all of these statutory interpretations, and, in so doing, to make clear that they are construing the statute and not simply their own rules.

The Commission also believes that it would be useful for the Agencies to retain in the rule a description of all the permitted uses of medical information, regardless of whether the conduct is permitted by the statute itself or by rule-made exception. Regulated entities can benefit from the clarity and assurance of a comprehensive statement of permitted conduct, easing their compliance burden.

The FTC supports the Agencies' goals of facilitating useful and legitimate loan transactions that benefit consumers, while protecting consumers' medical privacy as intended by Congress. Although the recommended interpretations will not entirely eliminate the problems resulting from differentiation among lenders with respect to their treatment of consumer medical information, they will minimize those differences and make available to all lenders many types of transactions from which consumers derive substantial benefit, without compromising consumers' medical privacy. The Commission thanks the Agencies for the opportunity to comment on this important rulemaking proceeding.

By direction of the Commission.

Donald S. Clark
Secretary